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No. 05-1279

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

MIDWEST GENERATION, EME, LLC,

Petitioner,

v.

LOCAL 15, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, and NATIONAL LABOR RELATIONS BOARD,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF

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STATEMENT PURSUANT TO RULE 29.6

Petitioner's corporate disclosure statement was set forth at page *ii* of its Petition for a Writ of Certiorari, and there are no amendments to that statement.

Respondent National Labor Relations Board ("the Board") provides no persuasive or principled reason for this Court to leave unreviewed the Seventh Circuit's holding that an employer must include crossover employees (*i.e.*, employees who abandon an ongoing economic strike) in a lawful bargaining lockout. As explained in Petitioner Midwest Generation's petition for a writ of certiorari, the court of appeals' decision conflicts with the National Labor Relations Act's dual protection of employee rights. 29 U.S.C. § 157 (employees have equally protected rights to either "engage in" or "refrain from" protected activity). The competing choices provided to employees under Section 7, and the benefits and consequences which derive from each, stand at the very heart of national labor policy. It is difficult to fathom a more compelling Section 7 question than the one presented by this case. Further, the court of appeals' decision simply cannot be reconciled with this Court's previous admonitions regarding the rights of crossover employees. *Trans World Airlines v. Indep. Fed'n of Flight Attendants*, 489 U.S. 426 (1989); Bd. Brf. at 8-9.

The Board does not seriously dispute any of these points. Instead, the Board, by implication, acknowledges that the court of appeals' ruling is "inconsistent" with *Trans World*. Bd. Brf. at 9 (noting that the court of appeals reversed a Board decision that was "fully consistent" with *Trans World*). The Board further concedes that the court of appeals' decision improperly requires employers to impose economic consequences on the very same employees who "refrained from" economic activity in the first instance. Bd. Brf. at 9 ("The effect of [the court of appeals' ruling] would be to penalize employees who exercised their right not to strike and to require employees who chose not to gamble on the success of the strike to suffer the consequences of the strikers' unsuccessful gamble."); *Trans World*, 489 U.S. at 438 (declining to "visit the consequences of the lost [strike] gamble on those who refused to take the risk"). Put simply, the Board's submission "opposes" Midwest Generation's petition in name only.

Nevertheless, Respondents essentially advance two arguments in opposition. The Board equivocally argues that the court of appeals' ruling and this Court's admonitions in *Trans World* do not "squarely conflict." Bd. Brf. at 9. Respondent Union, in turn, relies upon an unpublished decision of the D.C. Circuit in an attempt to bolster the court of appeals' clearly erroneous holding. Neither Respondent succeeds in articulating a reasonable basis for denying certiorari in this case.

1. The Act does not compel either labor or management to make concessions during the course of collective bargaining. 29 U.S.C. § 158(d). Put bluntly, the potential and actual use of economic weapons constitutes the primary tangible force pushing two adversarial parties towards agreement. *See NLRB v. Ins. Agents Int'l Union, AFL-CIO*, 361 U.S. 477, 495 (1960) (economic weapons are "part and parcel" of the collective bargaining process). For this reason, an employer may "convert [an] economic strike into an economic lockout when the strikers ask for reinstatement." *Field Bridge Assoc.*, 306 N.L.R.B. 322, 334 (1992), *enforced*, 982 F.2d 845 (2nd Cir. 1993). A lockout therefore constitutes a lawful "counteraction" to strike activity. *See Lodge 76 Int'l Assoc. of Machinists and Aerospace Workers v. Wisconsin Emp. Relations Comm'n*, 427 U.S. 132, 152-3 (1976); *Local 702, Int'l Bhd. of Elec. Workers v. NLRB*, 215 F.3d 11, 18 (D.C. Cir. 2000). The fundamental question presented by this case is whether an employer who exercises these established rights must lockout crossover employees who (a) have already "refrained from" the very strike activity a lockout is designed to counteract; and (b) have already returned (or offered to return) to work during the strike.

As the Board concedes, this Court's decision in *Trans World* compels the conclusion that crossovers should not be displaced from their jobs simply because the strike they refrained from prompts a counteracting lockout. *See* Bd. Brf. at 8-9. Section 7 protects both the right to "engage in" and "refrain from" strike activity in equal measure. 29 U.S.C. § 157. The effect of the court of appeals' decision is to elevate one right (the right to

engage in economic or strike activity) over its counterpart (the right to refrain from such activity). There is no statutory basis for this conclusion.

Indeed, as the Board acknowledges, the court of appeals' decision undoubtedly "penalize[s] employees who exercised their right not to strike and . . . require[s] employees who chose not to gamble on the success of the strike to suffer the consequences of the strike's unsuccessful gamble." Bd. Brf. at 9. This result is, in fact, squarely and fully in conflict with *Trans World's* dictates:

> We see no reason why those employees who chose not to gamble on the success of the strike should suffer the consequences when the gamble proves unsuccessful. Requiring junior crossovers, who cannot themselves displace the newly hired permanent replacements . . . to be displaced by more senior full-term strikers is precisely to visit the consequences of the lost gamble on those who refused to take the risk.

Trans World, 489 U.S. at 438; *accord AMI/HTI Tarzana-Encino Joint Venture, d/b/a Tarzana-Encino Reg'l Med. Ctr.*, 332 N.L.R.B. 914, 918 (2000). The court of appeals' decision simply cannot be reconciled with this Court's view of Section 7 rights as set forth in *Trans World* and, therefore, the petition should be granted.

Finally, contrary to the Board's position, the competing rights of crossovers and strikers are legitimate, fundamental and recurring issues in nearly every labor dispute nationwide. This Court, in fact, has stated that "virtually every" labor dispute involves crossover employees who refrain from strike activity. *See Trans World*, 489 U.S. at 436-7. The Board's assertion that issues relating to crossover employees do not arise with "sufficient frequency" to merit review fails in light of this Court's own statements and industrial realities. Review of the court of appeals' erroneous ruling on this recurring and significant issue, therefore, is clearly warranted. Bd. Brf. at 8 ("A majority of the

Board agrees with petitioner that the court of appeals erred in [holding that petitioner acted unlawfully].").

2. Respondent Union's submission actually underscores the glaring shortcomings contained in the court of appeals' decision. The Union relies almost exclusively on the D.C. Circuit's recent decision in *United Steel Workers v. NLRB*, No. 04-1435, 2006 U.S. App. LEXIS 11221 (D.C. Cir. Apr. 28, 2006), *rev'd sub nom. Bunting Bearings Corp.*, 343 N.L.R.B. No. 64 (2004). In that case, the D.C. Circuit invalidated a lockout instituted along union membership lines. As the D.C. Circuit explained, "no authority holds that [the Union] must initially do more than what [it] has done here: show a (perfect) correlation between union membership and which employees were locked out." *Id.* at *4 (quoting *Bunting Bearings Corp.*, 343 N.L.R.B. No. 64 at 8 (Liebman, dissenting).

Unlike *United Steel Workers*, this case is completely devoid of any allegation or evidence that Petitioner discriminated along union membership lines. As noted in both the Board and the court of appeals' decisions, the *Statement of Stipulated Facts* in this case states: "The Company accepted bargaining unit employees back to work *without regard to membership* status in the Union, or any union." Pet. App. at 3a, 25a (emphasis added). Because union membership played no role in Petitioner's actions, Respondent Union's reliance on *United Steel Workers* is wholly misplaced.

In fact, there is no evidence or even suggestion that Petitioner displayed any antiunion animus. Pet. 19-22. The linchpin of the court of appeals' decision is its conclusion that the lockout itself may serve as the basis for an unfair labor practice finding. Pet. App. at 19a; *see also NLRB v. Brown Food Store*, 380 U.S. 278, 288 (1965) ("[T]he Board must find from evidence independent of the mere conduct involved that the conduct was *primarily motivated* by an antiunion animus.") (emphasis added). Absent this erroneous legal conclusion, neither the court of appeals nor either Respondent suggests that Midwest Generation's actions were motivated by antiunion animus.

Without such evidence, the court of appeals clearly erred by invalidating the lockout. As established by this Court and as recognized by the Board, the key consideration in any lockout scenario is whether an employer acts based upon the proper motive of exerting economic pressure as opposed to an unlawful antiunion animus. Pet. App. at 39a ("proper analysis" of lockouts "demands that the simple intention to support the employer's bargaining position as to compensation and the like be distinguished from a hostility to the process of collective bargaining which could suffice to render a lockout unlawful") (quoting *Am. Ship*, supra, at 309); *see also Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 700 (1983) ("Congress . . . did not intend to make unlawful all acts that might have the effect of discouraging union membership. Rather, the intention was to forbid only those acts motivated by an antiunion animus") (internal citations omitted). Petitioner's undisputed good faith throughout collective bargaining and its overall course of conduct conclusively establish that the lockout was instituted for the legitimate objective of exerting economic pressure in support of lawful bargaining demands. Given this motivation, the court of appeals committed clear error in overturning the Board's decision.

Put simply, the question here is whether Petitioner locked out some 1100 employees for the lawful purpose of bringing closure to a prolonged contract dispute or for unlawful reasons unrelated to negotiations. Petitioner's reinstatement of every single striker once negotiations ended conclusively proves that Petitioner acted for lawful purposes. The court of appeals commits clear error in reaching the opposite conclusion.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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